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Supreme Court of the United States

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,

Appellant,

AGAINST

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,

Appellee.

APPELLANT'S BRIEF

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against

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,

Appellee.

APPELLANT'S BRIEF.

Statement of Proceedings Below.

This action was originally commenced in the Supreme Court of the State of New York, County of New York, which is a court of first instance. The Supreme Court of the State of New York, County of New York, dismissed the complaint on motion of the appellee. Such decision is not officially reported, but appeared in the New York Law Journal of October 27, 1944. Appeal was thereafter taken to the Appellate Division of the Supreme Court of the State of New York, which unanimously affirmed without opinion (261 A. D. 691). Appellant thereafter appealed to the Court of Appeals of the State of New York, which, is the Court of last resort, and which likewise affirmed without opinion (294 N. Y. 917). Appellant thereafter moved the Court of Appeals of the State of New York for reargument and for a certification that a question under the United States Constitution was presented and passed upon. The Court of Appeals denied the application for a reargument, but amended the prior judgment by certifying that a question under the Constitution of the United States was presented and necessarily passed upon (295 N. Y. 567, Record, page 26).

William Wilson, as Commissioner of Housing and Buildings of the City of New York was the original appellee. He resigned during the pendency of this appeal, and his successor, T. Newton Saxl, was substituted as appellee.

Jurisdiction.

This appeal is taken under Section 344 of Title 28 of the United States Code, which is likewise Section 237 of the Judicial Code. This section provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision in favor of its validity, may be reviewed by the Supreme Court of the United States upon appeal.

The Court of Appeals of the State of New York (295 N. Y. 567) amended the final judgment herein by adding the following certification:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States. This Court held that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is not violative of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States."

This Court on February 11, 1946, noted probable jurisdiction, and transferred this case to the summary docket (Record, page 34).

Statement of the Case.

Since this case involves multiple dwellings within the City of New York, a brief history of legislation affecting them is proper at the outset. While there are some early regulatory statutes in the State of New York, the general question of prescribing standards for tenement houses in the City of New York was first acted upon by the New York State Legislature in Chapter 334 of the Laws of 1901. Consequently, tenement houses built prior to 1901 are generally known as old law tenements, while tenement houses built subsequent to 1901 and prior to the adoption of the Multiple Dwelling Law, are called new law tenements. The Multiple Dwelling Law is Chapter 713 of the New York Laws of 1929. It resulted from the report of a Commission to revise the Tenement House Law, which report is set forth at pages 17 to 21 of the Record.

Lodging houses in the City of New York were not covered by the Multiple Dwelling Law, but were regulated by the Charter of the City of New York (Record, page 7). Lodging houses were brought under the Multiple Dwelling Law upon its enactment in 1929.

It may be said at this point that the purpose of the adoption of the Multiple Dwelling Law was not only to regulate future construction, but to legalize the conversion of private dwellings to multiple dwellings and likewise to legalize what were known as cooking alcoves in hotels. Under the Tenement House Law, a building was not considered a tenement house unless cooking was done therein. This distinction has been abolished by the Multiple Dwelling Law, but conditions were laid down for the legalization of cooking alcoves. The Multiple Dwelling Law itself recognized the cleavage between existing buildings used as multiple dwellings; existing buildings not multiple dwellings, but which might thereafter be converted to multiple dwellings; and multiple dwellings thereafter to be built. Section 8 of the Multiple Dwelling Law provides as follows:

> "A building not a dwelling if hereafter converted or altered to a multiple dwelling shall thereupon become subject to all the provisions of this chapter relative to dwellings of like class and kind hereafter erected."

The above provision is important, because the legislation attacked on this appeal made provision for existing buildings used as multiple dwellings, but made no provision for inferior buildings not used as multiple dwellings, but which thereafter might be converted to multiple dwellings.

The Multiple Dwelling Law itself laid down stringent rules for new construction in the matter of safety, ventilation and facilities. The building involved in the present appeal was constructed in 1940 (Record, page 6) and is representative of approximately ten buildings similarly situated.

The building itself is a four-story brick building, containing open dormitories on each floor, and is described as follows in the Statement as to Jurisdiction, on page 7:

> In the present buildings, the walls, stairs, stair enclosures and the first tier of beams are fireproof. The upper tiers are not fireproof, but have a fire resistance of approximately one hour. That is the only essential structural difference between this building and a fireproof building. This building is in all respects similar to the fine six-story apartment houses, such as are found on the Grand Concourse, in the Borough of the Bronx, or on Ocean Avenue in Brooklyn.

> It is alleged in the complaint that no fire has occurred in any lodging house built since 1929 in which there was any loss of life; and a check-up shows that no fire of any kind has ever occurred in these buildings.

It may be well at this point to summarize the situation concerning existing lodging houses in the City of New York. Most of them are located at the lower end of The Bowery in the Borough of Manhattan. Most of them are old buildings. Needless to say, there are practically no open lots on the Bowery, so that whoever desires to build a new lodging house would ordinarily take a business building and convert it to a lodging house by complying with the requirements for hereafter erected buildings. Only in the case of the appellant's building and a few others have new buildings been built since 1929. Needless to say, a business building built prior to 1929, but thereafter converted to a lodging house, would be far inferior to appellant's building in the matter of safety, ventilation and facilities.

The legislation which appellant attacks as unconstitutional is Section 4 of Chapter 553 of the laws of 1944. This Section, which went into effect on April 5, 1944, reads as follows:

> "Lodging houses of non-fireproof construction, existing prior to the enactment of this subdivision shall comply with the following conditions:"

The conditions themselves are set forth in the Instructions annexed to Exhibit 1 annexed to the complaint, which Instructions appear at pages 11 to 14 of the Record. The complaint alleges that practically all of the directed alterations are inapplicable to appellant's building (complaint, paragraph 20, at page 8 of the Record), but the important provision which is applicable is Subdivision (d) appearing at pages 11 and 12 of the record which is as follows:

> "(d) The entire buildings shall be provided with an automatic wet pipe sprinkler system. In connection with such system there shall be an automatic closed circuit fire alarm system so arranged and in-

stalled as to give warning at a recognized central station approved by the Fire Department. Such sprinkler and alarm systems shall have supervisory and maintenance service."

It is alleged in the complaint that the installation of such a sprinkler system would cost $7500 in a building worth approximately $25,000 (paragraph 22 of the complaint, page 8 of the Record); that the benefit to be obtained by such installation is negligible (paragraph 22 of the complaint, page 8 of the Record); and that the building as it exists is of the latest and most approved construction and is in every respect safe and proper for occupancy as a lodging house (paragraphs 6 and 7 of the complaint, page 6 of the Record). The legislation is therefore attacked as unconstitutional in paragraph 24 of the complaint by reason of the fact that the same is discriminatory and confiscatory (paragraph 24 of the complaint, pages 8 and 9 of the Record).

Specification of Errors.

The judgment in the Courts below is predicated upon a motion of appellee to dismiss the complaint as insufficient in law. Appellant is consequently entitled to every fair intendment of the complaint. The assigned errors urged upon this appeal are therefore as follows:

1. Assignment of error No. 3, attacking the legislation as discriminatory (Record, page 31).

2. Assignment of error No. 4, attacking the legislation as confiscatory (Record, page 31).

3. Assignment of error No. 7, attacking the legislation on the ground of unreasonable classification (Record, page 31).

4. Assignment of error No. 8, submitting that it was an

error to dismiss appellant's complaint on motion (Record, page 31).

The other assignments of error are subsidiary to the above four points.

Summary of Argument.

The following is a summary of the argument to be presented by the appellant:

1. Since the judgment of the Court below is based on a motion of appellee and not on proof, appellant is entitled to every fair intendment of the complaint, and the complaint is legally sufficient.

2. The legislation attacked is discriminatory, because it provides for the installation of an automatic wet pipe sprinkler system in appellant's building, but permits identical or inferior buildings adjacent to and directly competing with appellant without the necessity of any sprinkler system.

3. The legislation attacked is confiscatory because it requires the expenditure of an unreasonably large sum of money on a practically fireproof building, with practically no benefit and with no necessity.

POINT 1.

Since the judgment of the Court below is based on a motion of appellee and not on proof, appellant is entitled to every fair intendment of the complaint and the complaint is legally sufficient.

In the present appeal, the complaint was dismissed on motion of the appellee, and without giving appellant an opportunity to present any proof (Record, page 2).

This action in the New York Supreme Court is governed

by Section 275 of the New York Civil Practice Act, which provides as follows:

> "*Construction of pleadings.* Pleadings must be liberally construed with a view to substantial justice between the parties."

Since the complaint in the Court below was dismissed on motion of the appellee, the appellant is entitled to every fair intendment of the complaint.

> *Koewinthan* v. *Beth David Hospital et al.*, 9 N. Y. S. 2nd 367 at page 369.

in which the Court said:

> "On a motion for judgment on the pleadings, just as a motion to dismiss a complaint before answer for insufficiency, every intendment and fair inference must be attributed to the allegations of the complaint (Dyer v. Broadway Central Bank, 252 N. Y. 430, 432, 169 N. E. 635; Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N. Y. S. 184; Moore v. Bonbright & Co., Inc., 202 App. Div. 281, 195 N. Y. S. 854) to determine whether a cause of action may be spelled out."

Consequently, if the complaint spells any cause of action, it should not have been dismissed. This is particularly true since no leave to amend the complaint was granted below.

> *Dobbins* v. *Los Angeles*, 195 U. S. 223.

It will hereafter be shown that the complaint was legally sufficient.

POINT 2.

The legislation attacked is discriminatory, because it provides for the installation of an automatic wet pipe sprinkler system in appellant's building, but permits identical or inferior buildings adjacent to and directly competing with appellant without the necessity of any sprinkler system.

In the statement of the case herein, page 5, and in the statement as to jurisdiction at pages 8 and 9, appellant has set forth the factual situation with reference to existing lodging houses in the City of New York and to other buildings which might hereafter be converted to lodging houses. Existing lodging houses in the City of New York are centralized in a small district, where there is practically no open space. Consequently, anyone who desires to enter the lodging house business would either buy an existing building, wreck it, and erect a new building; or, much more likely, buy an existing building not used for dwelling purposes and convert it to a lodging house.

The statute attacked by its terms applies only to lodging houses existing prior to the enactment of the legislation on April 5, 1944. The enactment does not apply to buildings thereafter to be built or existing buildings thereafter to be converted. The appellant in the present case built its house in 1940 in conformance with every requirement of a stringent law (paragraphs 4 to 7 inclusive of the complaint, Record, page 6), and appellant's house is in every respect safe and proper (paragraph 13 of the complaint, Record, page 7). Nevertheless, under the legislation attacked, anyone else may buy an old loft building of much inferior construction immediately adjacent to appellant, and convert the building to a lodging house without the necessity of putting in an automatic wet pipe sprinkler system, or, in fact any sprinkler

system at all. This is not the equal protection of the laws guaranteed by the Fourteenth Amendment.

Fisher v. *Borough Council of Borough of South Toms River*, 13 New Jersey Miscellaneous 852, 181 Atlantic 630;
Michigan Lake Building Corporation v. *Hamilton*, 340 Ill. 284, 172 Northeastern 710;
Dowsey v. *Village of Kensington*, 257 N. Y. 221;
City of Vincennes, Ind. v. *Marland Refining Co.*, 33 Fed. 2nd 427.

This general rule is well set forth in the case of

Cowan v. *City of Buffalo*, 247 A. D. 591, 288 N. Y. S. 239.

as follows:

> "A statute or ordinance which amounts to a denial of the equal protection of the law to persons within the jurisdiction of the lawmaking body must be deemed unconstitutional and void, even if it is passed under the guise of the police power. Dobbins v. Los Angeles, 195 U. S. 233, 237, 25 S. Ct. 18, 49 L. Ed. 169; Gibbons 1. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23; Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, 626, 18 S. Ct. 488, 42 L. Ed. 878; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243."

The effect of the legislation attacked is exactly as if it said that all lodging houses existing on April 5, 1944 (the date of its enactment), must put in an automatic wet pipe sprinkler system, while other buildings existing and thereafter to be converted, or new similar buildings, need not. It is not claimed that the date bears any reasonable relation to the condition attacked. The legislation is therefore unconstitutional.

Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266 at page 274.

Should special circumstances be claimed, justifying the classification, such special circumstances should be alleged and proved at the trial.

Borden's Farm Products Company, Inc. v. *Baldwin*, 293 U. S. 194;
Tigner v. *Texas*, 310 U. S. 141.

POINT 3.

The legislation attacked is confiscatory, because it requires the expenditure of an unreasonably large sum of money on a practically fireproof building, with practically no benefit and with no necessity.

Legislation affecting the safety of a large number of persons is ordinarily within the police power of a State. However, as said in

12 Corpus Juris, at page 930.

> "The legislature may not, under the guise of the police power, impose on property burdens so excessive as to work a confiscation thereof."

Cooley's Constitutional Limitations, 8th Edition, at page 1231, lays down the rule as follows:

> "A police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion."

Has the Legislature of the State of New York gone too far in the present instance? We have here a practically fireproof building, erected a few years ago, having every possible safety device. There is no record of fires in this or similar buildings. The building is a small four-story building, valued at approximately $25,000. It caters to poor people and re-

ceives perhaps 35¢ a night for lodging. Every fire precaution has been taken. All this has been done in conformity with the law.

It is true that there are a great many other lodging houses in the City of New York, which do not meet these high requirements for safety construction and maintenance. No attack has been made upon the legislation insofar as it affects these other buildings, for which it was actually intended. But has not the legislature gone too far where the present building is concerned? It is true that the line may be hard to draw, but appellant is entitled to every reasonable inference in its behalf. Obviously, the present building cannot burn without giving ample opportunity to the occupants of its open dormitories for safe egress. If this legislation is constitutional in the case of a four-story building, would it be constitutional in the case of a one story building? Whatever the final outcome of this case may be upon the trial, is not appellant entitled to show that the tremendous expense to it, without any appreciable benefit, is such as to render the legislation confiscatory. The general rule in New York is set forth in

Adamec v. *Post*, 273 N. Y. 250 at page 256,

as follows:

> "Even so, as the court pointed out in Health Department of City of New York v. Rector, etc., of Trinity Church, supra, 145 N. Y. 32, at page 41, 39 N. E. 833, 836, 27 L. R. A. 710, 45 Am. St. Rep. 579, the discretion of the Legislature is not absolute. "The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method

or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public." In the same case the court quoted with approval from the opinion of Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, a L. R. A. 81, 12 Am. St. Rep. 560: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones would not be except by the exercise of the right of eminent domain."

The same rule as set forth above concerning the large expense and small benefit, was laid down by this Court in an opinion by Mr. Justice Holmes in

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393.

Litigation seeking to declare a statute unconstitutional as confiscatory is common. In all prior cases in the State of New York other than *Adamec* v. *Post* (*supra*), the complaint was not dismissed on motion but a hearing was had on the merits.

Cockroft v. *Mitchell*, 187 A. D. 189, Affirmed without opinion, 230 N. Y. 630;
Health Department v. *Rector*, 145 N. Y. 43;
Tenement House Department v. *Moeschen*, 179 N. Y. 325, 203 U. S. 383.

While the complaint was dismissed on motion in *Adamec* v. *Post* (*supra*), the complaint in that action attacked the Multiple Dwelling Law only on on the theory that the expense was great, and without attempting to show that the

great expense was confiscatory with reference to the benefit to be attained. The complaint in the present case is careful to set forth that the benefit to be obtained by the statute is negligible, while the expense is confiscatory (paragraphs 22 and 24 Subdivision (b) of the complaint, pages 8 and 9 of the Record).

CONCLUSION.

The final judgment appealed from should be reversed.

Respectfully submitted,

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